Supreme Court, U.S.
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CLERK

85-1103

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LUZ MARIA CHALUISSANT,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SPIROS A. TSIMBINOS, ESQ.
Attorney for Petitioner
Office & P.O. Address
119 Mowbray Drive
Kew Gardens, New York 11415
(718) 849-3599

43PP

QUESTIONS PRESENTED FOR REVIEW

1. Did the trial Court improperly allow in evidence alleged hearsay declarations of co-conspirators when:

(a) There was a failure to establish the existence of the alleged conspiracy and the Petitioner's connection thereto by a clear preponderance of the evidence independent of the hearsay declarations.

(b) There was a failure to establish the unavailability of the alleged co-conspirator Gilbert Lopez, Sr.

(c) The co-conspirator Luisa Figueroa was available to testify and in fact was called as a government witness.

LIST OF PARTIES

The parties to the instant proceeding are Luz Maria Chaluissant and the United States of America as Respondent.

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To the Honorable The Chief Justice,

and Associate Justices of the

Supreme Court of the United States:

OPINIONS BELOW

The Opinion and Order of the United States Court of Appeals for the Third Circuit has not yet been officially reported, but is reproduced herein in Appendix A.

JURISDICTIONAL GROUNDS

The Order of the United States Court of Appeals for the Third Circuit affirming the Petitioner's conviction was entered on October 28, 1985. The Petitioner is, therefore, timely filing this application for a Writ of Certiorari and the jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. §1254.

CONSTITUTIONAL PROVISIONS

Constitutional provisions involved in this case are the Confrontation Clause of the Sixth Amendment and the denial of Due Process of Law and a Fair Trial under the Fifth Amendment to the United States Constitution.

STATEMENT OF THE CASE

The Petitioner Luz Maria Chaluissant was convicted of conspiracy to distribute Heroin in violation of Title 21 U.S.C. §§ 841(a)(1) and 846. The government contended in Indictment number 83-349-3 filed in the United States District Court for the Eastern District of Pennsylvania that the Petitioner conspired with fifteen other named individuals from on or about October, 1980 to October 17, 1983 in

Berks County, Pennsylvania.

The theory of the government's case was that one Luisa Figueroa, assembled and supervised a group of persons who transported heroin into Berks County and distributed it therein. It was claimed that as part of said conspiracy the Petitioner, located in New York City supplied Luisa Figueroa with the quantities of heroin. The Petitioner was convicted in the Eastern District of Pennsylvania on January 28, 1985 and was sentenced to a term of fifteen years and a $10,000.00 fine. The Petitioner's conviction was affirmed by the United States Circuit Court of Appeals for the Third Circuit on October 28, 1985.

During the trial, the prosecution relied heavily on the introduction into evidence over the objections of defense

counsel of numerous hearsay declarations attributed to co-conspirators. These out of court hearsay declarations were to the effect that the Petitioner was Luisa Figueroa's sister-in-law and her drug supplier.

ARGUMENT

The trial court improperly allowed into evidence herarsay declarations of the alleged co-conspirators, Gilbert Lopez, Sr. and Luisa Figueroa in violation of the hearsay principles and the Confrontation Clause of the Sixth Amendment. This Court has long recognized the importance of a defendant's right to confrontation and cross-examination. In Pointer v. Texas, 380 US 400, 405 (1965) this court specifically stated:

> "There are few subjects perhaps upon which this court and other courts have been more nearly unanimous than in their expression of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."

See also Douglas v. State of Alabama, 380 US 415 (1965); Barber v. Page, 390 US 719 (1968); Ohio v. Roberts, 448 US 56 (1980).

In Ohio v. Roberts, supra, at page 63, this Court in reviewing the history of the Confrontation Clause concluded that:

> "In short the clause envisions a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. (Citing Mattox v. United States, 156 U.S., at 242-243 (1895)"

In Ohio v. Roberts, supra, this Court discussed the necessity of accomo-

dating the Confrontation Clause to other competing interests and concluded that in some instances, the Confrontation Clause had to give way to other considerations of public policy and the necessities of the case. Such an exception to the confrontation rule has been recognized in the area of co-conspirators declarations, where the defendant's connection to the conspiracy has been established by a clear preponderance of the evidence independent of the hearsay declarations and where the government has established the unavailability of the out of court declarant. Although, recognizing possible exceptions to the confrontation rule, this Court has made it clear however, that in order to justify the exception strict adherence to the requirements listed above must be followed. Thus, in Ohio v. Roberts, supra at page

65 this court reiterated:

> "The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. In the usual case,... the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant. See Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed. 2d 293 (1972); Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968). See also Motes v. United States, 178 U.S. 458, 20 S.Ct. 993, 44 L.Ed. 1150 (1900); California v. Green, 399 U.S., at 161-162, 165, 167, n.16, 90 S.Ct., at 1936-1937, 1938, 1939, n. 16."

In the case at bar, the prosecution was improperly allowed to introduce the out of court declarations throughout the entire trial without a proper showing that the petitioner was linked to the conspiracy and that the out of court de-

clarants were unavailable.

(a) Failure to Link the Petitioner to the Alleged Conspiracy.

The essential element of conspiracy is an agreement to commit a specific crime, where all of the conspirators share a common objective. A "meeting of the minds" is required. See United States v. Falcone, 311 U.S. 205 (1940); Krulewitch v. United States, 336 U.S. 440 (1979); Iannelli v. United States, 420 U.S. 770 (1979).

In the case at bar, a review of the evidence indicates a failure to establish that the Petitioner was a knowing participant in the conspiratorial enterprise operated by Luisa Figueroa. There was nothing to indicate that Chaluissant, based in New York agreed to or was a part of the conspiratorial scheme to distribute heroin within

Pennsylvania. On the contrary, the evidence viewed in the light most favorable to the government reveals only that the Petitioner may have sold heroin to Figueroa's agents in New York. In fact, the testimony of the governments own witnesses indicated that the Petitioner acted as an "independent contractor" without any objective to be involved in Figueroa's conspiracy. Thus, Gilbert Lopez, Jr., testified that he had previosly stated that Luisa Figueroa had obtained drugs from other parties (A-60, 71, 72)* and Enoc Rodriguez testified that he was told by Figueroa in July of 1983, that the Petitioner was over charging and that he should go to New York to deal with other parties(A-395).

In the landmark case of Kotteakos v. United States, 328 US 750 (1946),

*A refers to joint appendix filed in the Third Circuit.

this Court reversed conspiracy convictions when the evidence did not sustain a single overall conspiracy, but instead involved various independent groups. Finding the essential element was the nature of the agreement, this Court concluded that there was no overall goal or common purpose.

Thus, in the case at bar, there was no independent evidence to link the Petitioner to the conspiracy and the Prosecution sought to utilize the out-of-court hearsay declarations to establish their case. This court in Glasser v. United States, 315 US 60, 75 (1942) stated appropo to the situation herein:

> "The common enterprise cannot be established solely by the words of the self-proclaimed participant, since '[o]therwise, hearsay would lift itself by its own bootstraps to the level of competent evidence."

The need to limit the scope of the hearsay exception in Federal conspiracy trials was recently recognized by this Court because of "the courts disfavor of attempts to broaden the already pervasive and wide sweeping nets of conspiracy prosecutions." See Dutton v. Evans, 400 US 74, 83 (1970), citing Grunewald v. United States, 353 US 391 (1957).

In the case at bar, the government used the conspiracy theory to improperly introduce out of court declarations, thereby denying the Petitioner fundamental constitutional rights.

(b) Failure to Establish that Gilbert Lopez, Sr. Was Unavailable.

This court in Ohio v. Roberts, supra, firmly established that the Prosecution has the burden of proving the unavailability of an out of court declarant

before the out of court statement could be admitted under Rule 801 of the Federal Rules of Evidence. See also United States v. Caputo, 758 F2d 944 (3rd Cir., 1985). In the case at bar, all of the co-conspirators declarations were allowed into evidence prior to any showing of unavailability. Only belatedly toward the end of the trial did the court hold in camera hearings on the issue. With respect to the co-conspirator Gilbert Lopez, Sr., the court concluded that he was unavailable because he did not want to testify and raised a self-incrimination privilege. The court below thus stated on the record:

> "He simply does not want to be involved, does not wish to testify, is a very reluctant witness. He has been convicted, he is now serving in prison, and he simply wants to have nothing to do with the case."(A-317).

It must be noted that this Court in Ohio v. Roberts, supra, indicated that:

> "If there is a possibility albeit remote, that affirmative measures might produce the declarant the obligation of good faith may demand their effectuation."

See also, United States v. Caputo, 758 F2d 944 (3rd Cir., 1985); United States v. Inadi, 748 F.2d 812 (3rd Cir., 1984). Rather than exerting affirmative measures to have Lopez testify, the Court below declared the witness unavailable solely on his desire not to testify and his purported assertion of his Fifth Amendment privilege. Although, the government in the Court below argued that Lopez was correctly declared to be unavailable because of his Fifth Amendment privilege, citing Hoffman v. United States, 341 US 479 (1975), this Court has since made it

clear that a plea of guilty constitutes a waiver of self incrimination rights. See Boykin v. Alabama, 395 US 238 (1969); McCarthy v. United States, 394 US 459 (1969); Namet v. United States, 373 US 179 (1963); Reina v. United States, 364 US 507 (1960), see also Annotation in 9 ALR 3rd 990.

In the case at bar, Gilbert Lopez, Sr., had pleaded guilty with regard to the indictment and had already been sentenced. This case thus offers this court an opportunity to decide the issue of whether a convicted co-conspirator can attempt to invoke the self incrimination privilege so as to make himself unavailable within the provisions of Rule 804 of the Federal Rules of Evidence.

(c) The Admission of Alleged Declarations of Luisa Figueroa in Spite of the Availability of that Witness to Testify.

Almost immediately when the trial commenced and continuing throughout, the prosecution elicited from witnesses, out-of-court declarations of Luisa Figueroa that the Petitionerwas her sister-in-law and her supplier of drugs (A-34-36, 40-41, 277, 390-395). This the prosecution did knowing full well that Luisa Figueroa was available to testify. In fact, Luisa Figueroa's counsel had advised the court that his client would not assert the Fifth Amendment privilege (A-305). After a belated in camera hearing, the court below in fact concluded that Luisa Figueroa was an available witness (A-530). Based upon this ruling, there was no good faith basis established for the introduction of the out-of-court statements and they were improperly

admitted into evidence. See Barber v. Page, 390 US 719 (1968).

Significantly, Professor Davenport, in his detailed and lengthy analysis of the "Confrontation Clause and the Coconspirator Exception," concludes at 85 Harvard Law Review 1403 (1978):

> "Coconspirator hearsay is inadmissable until the prosecution has made an affirmative showing that the declarant is unavailable."

In the case at bar no such showing was ever made so as to justify the admissibility of the out-of-court statements.

After the court below made its ruling that Figueroa was available, the prosecution sought to rectify its prior use of her out-of-court statements by calling Figueroa as a witness. The prosecution however only asked Figueroa two preliminary questions having to do with whether she lived in Reading,

Pennsylvania, and whether she had been indicted. No questioning was done with respect to the alleged out-of-court declarations. The prosecution thus sought to by-pass a direct answer from the source of the alleged declarations and instead to rely on the hearsay testimony of other witnesses. The Third Circuit Court of Appeals in United States v. Inadi, 748 F.2d 812 (3rd Cir., 1984), stated appropo to the situation herein:

> "Indeed with commentators increasingly of the view that the broad coconspirator exception to the hearsay rule can only be justified as a matter of necessity . . . it does not seem unreasonable to require the government to demonstrate that its hardship is real before availing themselves of this tremendous evidentiary advantage".

In the case at bar, the prosecution sought to hide its weak case behind a hearsay shield in order to obtain a

conviction. Significantly, a learned commentator in his Note "Confrontation and the Hearsay Rule" 75 Yale Law Journal 1434, 1439, 1442 (1966), has stated that a prosecutor should be prevented from making "the testimony less reliable than it might have been" and has suggested that an "availability rule" be made a canon of professional behavior.

It must also be noted that the prosecutor's clever ploy of placing Luisa Figueroa on the stand and merely making her available to defense counsel for cross-examination did not cure the serious error which occurred herein, but instead compounded the prejudice involved. This was so, because the Petitioner was in effect placed in a position of proceeding to inquire as to the out-of-court declarations without being the one who was offering them in evidence. Also, the Petitioner was placed in the very

tenuous situation of adopting a witness as her own without any prior warning or knowledge of what her testimony might be. Being placed in this precarious position defense counsel decided not to question at all, but then found that the court below turned this decision against him by specifically advising the jury:

> "Members of the jury under the law of this Circuit the Government was required to produce Luisa Figueroa as a witness. They have done so, and this is the reason for the procedure we just followed." (A-544)

The court below also in front of the jury advised defense counsel:

> "Mr. Schreiber, the Government has made this witness Luisa Figueroa, available to you and your client for Cross-examination, under the law of this Circuit. I will permit you to have broad Cross-examination under Rule 611(b). Would you proceed with Cross-examination, sir?" (A-544)

Defense counsel advised the Court that based upon his prior comments he would not cross-examine, to which the Court again replied, "You have no questions you wish to ask this witness under Cross-examination?" (A-543,544).

The court below by its comments, and the prosecutor by her actions, in effect improperly transferred the burden of proof to the Petitioner. The Petitioner was in effect placed in a position of being asked to cross-examine on the out-of-court declarations or having the jury draw an unfavorable inference thereto. The impropriety of such a situation has been clearly recognized and suggested by several federal appellate courts. Thus, for example, in Simmons v. United States, 440 F2d 890, 891 (7th Cir.,1971) the Seventh Circuit stated:

> "It seems to us . . . that where an extrajudicial declaration is used under circumstances such that the opportunity to cross-examine the declarant is essential to a defendant's right of confrontation, it must be the government's burden to produce the declarant. Mere availability, in the sense that the defendant could have subpoenaed him, does not, in our opinion, suffice."

Similarly, the Second Circuit in United States v. Oates, 560 F2d 45, 82 (2nd Cir., 1977) stated:

> "Beyond the necessary demonstration that the extra-judicial statement is trustworthy, there arises a real question, which this case would present, whether the prosecutor bears the additional burden of producing all available declarants upon whose extra-judicial declarations the government intends to rely, or, in the alternative, showing the unavailability of these declarants. Our decision in United States v. Puco, 476 F2d 1099 (2nd Cir., 1973), indicates that when the extra-judicial statement is

> not crucial to the government's case or is not devastating to the defense, a showing by the government that the declarant is unavailable is not a prerequisite to introduction of the statement. However, we also found in Puco that the 'scope [of the holding of Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)] is uncertain in view of both the facts of the case and other recent decisions,' id. at 1103, and, indeed, there is reason to believe that after Mancusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970); Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1968); and Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), the government does bear the burden of producing extra-judicial declarants, or of demonstrating their genuine unavailability whenever the extra-judicial statements being offered at trial are crucial to the government's case."

Further, in United States v. Oates, supra, the court at footnote 39 of its

decision discussed the sharp division within the Fifth Circuit* on the issue and appeared to side with the dissenting judges in that jurisdiction. Thus the Court stated:

> "In any event, the right of confrontation is broader than the right to cross-examination and it is the prosecutor who should have the burden of producing witnesses against the defendant."

In the case at bar, the hearsay declarations were crucial to the prosecution case. This is thus not a situation where "the utility of trial confrontation is so remote" so as to excuse the production of an available witness.

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*See, also, Park v. Huff, 493 F2d 923, 934-35(5th Cir., 1974), rev'd on rehearing en banc, 506 F2d 849 (5th Cir.) (over dissent of six judges), cert denied, 423 U.S. 824; Hoover v. Beto, 439 F2d 913, 924 (5th Cir., 1971), rev'd on rehearing en banc, 467 F2d 516 (5th Cir.)(over dissent of seven judges), cert denied, 409 U.S. 1086).

See footnote 7 in Ohio v. Roberts, supra, citing Dutton v. Evans, supra.

It must be noted that defense counsel in the case at bar, strongly objected to the situation which occurred and even requested a mistrial (A-533-541, 544).

In light of the confusion and sharp differences of opinion among the Federal Judiciary regarding the issues presented herein, this Court should grant the instant Petition so as to clarify the law on the issue. It must also be noted that the case of United States v. Inadi, supra, also from the Third Circuit and which deals with the same general issue as herein was recently argued before this Court on December 3, 1985 under Docket Number 84-1580. Since the instant Petition involves additional aspects of the issue raised in the Inadi

case, this Court should grant the instant Writ of Certiorari so as to fully resolve all questions on the subject matter.

CONCLUSION

THE PETITION FOR A
WRIT OF CERTIORARI SHOULD
BE GRANTED.

Respectfully submitted,

SPIROS A. TSIMBINOS,ESQ.
Of counsel to
KENNETH SCHREIBER, ESQ.
Attorney for Petitioner
Office & P.O. Address
119 Mowbray Drive
Kew Gardens, N.Y. 11415
Tel.: (718) 849-3599

APPENDIX

APPENDIX A -

ORDER AND JUDGMENT OF THE COURT BELOW RENDERED OCTOBER 28, 1985

UNITED STATES COURT OF APPEALS
FOR THE
THIRD CIRCUIT

Submitted under
Third Circuit Rule 12(b)
Monday, October 21, 1985.

BEFORE:

GARTH and BECKER, Circuit Judges, and VAN DUSEN, Senior Circuit Judge.

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UNITED STATES OF AMERICA,

Appellee,

-against-

CHALUISSANT, LUZ MARIA
a/k/a Maria
a/k/a Hela,

Appellant.

----------X

No. 85-1067

Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. No. CR 83-00349-03) District Judge: Honorable Daniel H. Huyett, 3rd.

After considering the contentions raised by appellant, to wit, the court erred:

1. In that the prosecution failed to establish the appellant's guilt beyond a reasonable doubt;

2. In that the prosecution failed to prove, by a clear preponderance of the evidence, the existence of an agreement by the defendant-appellant with others to distribute heroin in the Eastern District of Pennsylvania in an unlawful common enterprise, which appellant describes as "the Figueroa conspiracy;" and

3. In that there was a failure to establish the unavailability as a witness of Gilbert Lopez, Sr. and Angel Luis Figueroa within the requirements of Fed. R. Evid. 801(d)(2)(E) and 802, requiring a new trial under United States v. Caputo, 758 F.2d 944 (3d Cir. 1985), and United States v. Inadi, 748 F.2d 812 (3d Cir. 1984); it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

ATTEST:

SALLY MRVOS, Clerk

Dated: October 28, 1985.